UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

MASTEC ADVANCED TECHNOLOGIES,
a division of MASTEC, INC.

and **Case 12–CA–24979**

JOSEPH GUEST, an Individual

DIRECTV, INC.

and **Case 12–CA–25055**

JOSEPH GUEST, an Individual

Christopher C. Zerby, Esq., and Rachel Harvey, Esq.,
for the General Counsel.
Gavin S. Appleby, Esq., and Jenna S. Barresi, Esq.,
for the Respondent MasTec, Inc.
Curtis L. Mack, Esq., and Brennan W. Bolt, Esq.,
for the Respondent DirecTV, Inc.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Orlando, Florida, on July 23-25, 2007. Joseph Guest, an Individual, filed the charge in Case No. 12-CA-24979 on May 5, 2006[1] and amended it on June 29 and August 21. Guest filed the charge in Case No. 12-CA-25055 on June 29, and amended it on August 21. Based upon these charges, the consolidated complaint issued on April 30, 2007, alleging that Respondents MasTec Advanced Technologies, a division of MasTec, Inc. (Respondent MasTec), and DirecTV, Inc. (Respondent DirecTV), violated Section 8(a)(1) of the Act in connection with the termination of 26 individuals employed by MasTec to perform services under a contract between MasTec and DirecTV.[2] Specifically, the consolidated complaint alleges that the named employees engaged in protected concerted activities during the period January through March, 2006, including appealing to the public by participating in the production of a television news report that aired on May 1 and 2. It is further alleged that DirecTV attempted to cause and caused MasTec to terminate the 27 employees, and that MasTec terminated these employees, because of their participation in this protected concerted activity. The consolidated complaint also alleges that Christopher Brown and Noel Muniz, alleged supervisors of Respondent MasTec, threatened employees with discharge and other unspecified reprisals because of their protected concerted activity. Finally, the consolidated complaint alleges that Respondent MasTec violated Section

[1] All dates are in 2006 unless otherwise indicated.

[2] The consolidated complaint originally named 27 alleged discriminatees. At the hearing, the General Counsel amended the complaint to delete one individual, James Tuckfield, after evidence was presented showing that he had not been discharged.

8(a)(1) of the Act by maintaining confidentiality, solicitation and distribution rules that allegedly infringed employees' exercise of their Section 7 rights.

Respondent MasTec filed its answer to the consolidated complaint on May 14, 2007, denying that it committed the alleged unfair labor practices and asserting several affirmative defenses. Specifically, Respondent MasTec asserted that the allegedly unlawful rules had been rescinded and that the employees who were terminated had been engaged in activities that were not protected under the Act and/or were terminated for cause unrelated to any concerted activity. Respondent DirecTV also filed its answer to the consolidated complaint on May 14, 2007, denying the alleged unfair labor practices and raising similar affirmative defenses. At the hearing, Respondents amended their answers to withdraw those affirmative defenses suggesting that the employees were terminated for reasons other than their participation in the television broadcast.

As framed by the amended pleadings, the principal issue in this case is whether the 26 employees who participated in the news report, as broadcast several times on the local television station, lost the protection of the Act because several employees made statements during the broadcast that allegedly disparaged the Respondents and their products and services or were otherwise disloyal to their employer. Resolution of this issue is governed by the Supreme Court's decision in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) and its progeny. The pleadings also raise other issues, including whether Respondent DirecTV caused Respondent MasTec to terminate the employees and whether the two supervisors alleged in the complaint made statements that constitute unlawful threats under the Act. The legality of Respondent MasTec's rules is a separate issue unrelated to the allegedly unlawful terminations.

On the entire record[3], including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent MasTec and Respondent DirecTV, I make the following

Findings of Fact

I. Jurisdiction

Respondent MasTec, a corporation, provides television satellite installation and maintenance services for Respondent DirecTV from several facilities in Florida and other states, including the facility in Orlando, Florida that is involved in this proceeding. In conducting its business operations, Respondent MasTec annually purchases and receives at its Florida facilities materials valued in excess of $50,000 directly from points outside the State of Florida. Respondent MasTec admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent DirecTV, a corporation, with its principal office and a place of business in El Segundo, California, is engaged in the business of providing television programming via satellite throughout the United States, including in the State of Florida. In conducting its business operations, Respondent DirecTV derived gross revenues in excess of $500,000 and provided services valued in excess of $50,000 in states other than the State of California. Respondent

[3] The General Counsel's unopposed motion to correct the transcript is granted, as is Respondent DirecTV's unopposed Motion to Substitute Hearing Exhibit. The respective motions are received in evidence as ALJ Exhibits 1 and 2.

DirecTV admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Respondent MasTec's Rules

There is no dispute that the Employee Handbook in effect in March 2006 covering Respondent MasTec's employees contained the following provisions:

> **CONFIDENTIALITY POLICY**
>
> No team member may use Confidential Information (as defined below) to personally benefit himself, herself, or others. In the handling of all Confidential Information, team members must not communicate such information to anyone, inside or outside the Company (including to family members), except on a strict "need-to-know" basis and under circumstances that make it reasonable to believe that the information will not be used or misused or improperly disclosed by the recipient. Team members must be careful to avoid discussing Confidential Information in any place (for instance, in restaurants, on public transportation, in elevators) where such information may be heard or seen by others….
>
> "Confidential Information" includes, but is not limited to, any documents, knowledge, data or other information relating to … (6) the identity of and compensation paid to the Company's team members, consultants and other agents: …
>
> **SOLICITATION**
>
> Contributions may not be solicited on company property without the permission of the supervisor or Division manager.
>
> **DISCIPLINE**
>
> EXAMPLES OF VIOLATIONS CAUSING IMMEDIATE TERMINATION
>
> ……
> - Unauthorized distribution of written or printed matter;
> - Unauthorized solicitations or collections;
>
> …..

In Respondent MasTec's vernacular, an employee is referred to as a Team Member. Respondent acknowledged that the same handbook applied at all of its facilities nationwide. There is no evidence of any employee being disciplined under these rules.

Mark Retherford, Respondent MasTec's Senior Vice President, testified that the handbook had been updated "recently" and that the new handbook was being distributed in the field at the time of the hearing. No other evidence was offered by Respondent MasTec regarding when the handbook was revised or exactly how the revision was communicated to the employees. The confidentiality rule in the new handbook does not include employee compensation in the definition of confidential information and contains the following new language:

> Of course, the Company recognizes that employees have the right to discuss work-related matters and concerns, including those related to terms and conditions of work.

The updated handbook also contains a new provision governing solicitations, distributions, and use of bulletin boards which appears on its face to comply with Board precedent regarding such rules. In any event, the General Counsel does not allege that the new provision is unlawful.

In determining whether an employer's mere maintenance of a work rule violates the Act, the Board considers whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. In making this determination, the Board gives the rule a reasonable reading and refrains from reading particular phrases in isolation. *Albertson's, Inc.,* 351 NLRB No. 21, slip op. at 6 (Sept. 29, 2007) and cases cited therein. Under the test adopted by the Board in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), the Board first asks "whether the rule *explicitly* restricts activities protected by Section 7." (Emphasis in original.) If so, the rule is unlawful. If it does not explicitly restrict protected activities,

> The violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Id. at 647. Accord: *Albertson's, Inc.,* supra.

Respondent MasTec's confidentiality rule, at least as it existed in March 2006, clearly violates the Act under this test. The rule explicitly includes information such as employee names and compensation within the definition of confidential information. The Board has long held that an employer may not restrict employees in sharing such information as such discussions among employees are usually a precursor to protected organizational activity. See *Jeannette Corporation,* 217 NLRB 653 (1975) enfd. 532 F.2d 916 (3rd Cir. 1976). Accord: *Fredericksburg Glass & Mirror, Inc.,* 323 NLRB 165 (1997). It is immaterial that Respondent MasTec may not have disciplined any employee under this rule for disclosing such information. The mere maintenance of such a rule would reasonably tend to chill employees in the exercise of their right to discuss their wages and working conditions. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998).

Respondent MasTec's solicitation and distribution rules are overly broad under current Board law because they would restrict employees from engaging in protected solicitation anywhere on company property, regardless of whether the employee was on work-time or in a work area, and would subject employees to possible termination if they engaged in solicitation without permission. Similarly, employees would be subject to possible termination if they engaged in distribution of protected material without permission regardless of the site of the distribution and their work status. These rules, as they existed in March 2006, clearly violate Section 8(a)(1) of the Act. See *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Our Way, Inc.,* 268 NLRB 394 (1983); See also *Tele Tech Holdings, Inc.* 333 NLRB 402, 403 (2001) (any rule that requires employees to secure permission from their employer before engaging in protected concerted activity at an appropriate time and place is unlawful).

Respondent MasTec essentially concedes that the above-quoted rules were unlawful. It failed to make any argument in its brief in opposition to the General Counsel other than to rely

upon the putative revision of the rules and the apparent legality of the current rules. However, in the absence of specific evidence showing that the new rule was in fact communicated to the affected employees, or that they were informed that the old rules were being rescinded and that employees would now be free to engage in protected activity at the appropriate times and places, I can not find that Respondent MasTec has effectively repudiated the unlawful rules. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). See also *Claremont Resort & Spa,* 344 NLRB 832 (2005). Accordingly, I find that Respondent MasTec violated Section 8(a)(1) of the Act, as alleged in the complaint, by maintaining the confidentiality rule and the overly broad solicitation and distribution rules in its employee handbook.

B. The Termination of the 26 Employees

1. *The Evidence*

Respondent MasTec is an "infrastructure company" in the utility, telecommunications and power energy fields. Its Advanced Technologies Division, involved in this proceeding, is focused on installing, upgrading and servicing satellite television systems sold by entities such as Respondent DirecTV. Respondent MasTec is one of Respondent DirecTV's "home service providers", or HSPs, and accounts for approximately 30% of DirecTV's installations and upgrades. Each HSP is assigned a geographic territory where it performs installation and service exclusively for DirecTV. The HSP involved in this proceeding is in the Orlando, Florida area. In 2006, Respondent MasTec employed over 100 technicians in the Orlando facility who worked exclusively on DirecTV products. Herbert Villa, Respondent MasTec's Senior Technical Supervisor, was responsible for day-to-day supervision of these technicians. He reported to Christopher Brown, who was Respondent MasTec's operations manager for North Florida. Brown in turn reported to Mark Retherford, Respondent MasTec's Senior Vice President responsible for the DirecTV business. Steven Crawford is Respondent DirecTV's Vice President of Field Operations responsible for overseeing the activities of the HSPs, including Respondent MasTec.

The relationship between the Respondents is governed by a contract, or Home Service Provider Agreement. The 2005 Agreement, which was in effect during the relevant period here, prohibits Respondent MasTec from working for any other satellite television provider. Under this agreement, Respondent MasTec is paid by Respondent DirecTV for each satellite TV installation in its territory, regardless of whether the service was ordered through Respondent DirecTV or through a third party retailer, such as Direct Star TV. The initial installation includes, per contract, connection of an active telephone line from the customer's home to the satellite TV receiver and part of the fee paid by Respondent DirecTV to Respondent MasTec is for this connection. The customer is not charged for a routine telephone line connection. The 2005 HSP Agreement also contains penalties if MasTec or any other HSP fails to meet performance standards, including removal of territory. The record contains evidence that Respondent DirecTV in fact exercised this option in 2004 by removing territory from MasTec in New Jersey. The contract requires Respondent MasTec employees to wear DirecTV uniforms and drive vehicles bearing the DirecTV logo. However, Respondent MasTec is not involved in the hiring or day-to-day supervision of Respondent MasTec's employees. Respondent MasTec is solely responsible for determining the wages and benefits provided to technicians it hires to service this contract.

The 100 or so technicians who worked out of Respondent MasTec's Orlando office were divided into seven teams, each reporting to a supervisor, who held weekly team meetings. As noted above, Villa was in charge of the Orlando office. In addition to the weekly team meetings, Respondent MasTec conducted training, both initially when a technician was hired, and

periodically thereafter, to remind employees of the requirements of the job or to introduce new methods or procedures. All employees were also given training materials when hired and throughout their employment, including periodic "Tech Tips" prepared by Respondent DirecTV, and each technician carried in his or her vehicle Respondent DirecTV's "Standard Professional Installation Guidelines". It is undisputed that all of the training and the materials distributed to the technicians regularly reminded them of the importance of connecting phone lines to receivers as part of the installation process.[4]

Respondent MasTec's Orlando technicians typically report to the Orlando facility each day at 7:00 am to pick up their route assignments for the day and any equipment they will need to complete the assignments on the schedule.[5] The assignments are designated as either "A.M." or "P.M." based on when the customer has been told the technician would be there. The A.M. assignments are expected to be done between 8:00 am and 12:00 noon. The P.M. assignments are to be done between 1:00 pm and 5:00 pm. When a technician arrives at the customer's home, he or she will review the order with the customer, determine with the customer where is the best place to locate the satellite dish, and discuss the location of the televisions to be connected to the receiver. The technician is also expected to review the installation procedure, including the telephone line connection, answering any questions the customer has regarding this. Once the installation is complete and the receiver is connected, the technician calls DirecTV to activate the receiver and verify the signal. He or she will then educate the customer on how to use the product. These procedures are spelled out in the "Statement of Work" contained in the HSP Agreement. Technicians are paid piecemeal by the job, based on the type and size of the job. As a result, the more installations a technician is able to complete in a day, the higher his pay.

There was a great deal of testimony regarding the telephone connection part of an installation. It is clear that this is vitally important to Respondent DirecTV and, by extension Respondent MasTec. A receiver that is connected to an active telephone line is called a "responder" while those that are not connected are called "non-responders". There is no dispute that a receiver does not need to be connected to an active telephone line in order for a customer to receive a satellite signal. Rather, according to the Respondents' witnesses, it is a convenience feature which allows a customer to order pay-per-view broadcasts via remote control, to have caller ID displayed on the television screen, and to receive downloads from DirecTV of software upgrades. Of course the telephone connection also allows DirecTV to track the programs that its customers watch, information which DirecTV may use to determine programming, etc.

As previously noted above, there is no separate charge to the customer for a standard telephone line connection. However, if a customer does not want exposed telephone lines running across the room or along the baseboard, they can opt for a custom installation, such as a "wall fish", in which the technician will "fish" behind the wall to run the telephone wire to the satellite receiver. Another option is a wireless telephone jack. Customers who choose these options are charged $52.50 for a "wall fish" and $49.00 for a wireless jack. These charges are determined by Respondent MasTec, not Respondent DirecTV.

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[4] In fact, virtually all of the training materials in evidence refer to connection of telephone lines as a mandatory part of the technician's installation procedures.

[5] Some of Respondent MasTec's technicians, such as Rudy Rodriguez who testified at the hearing, receive their assignments via fax at home because of the distance they live from the office. These technicians still are required to come in for the weekly team meetings and also, from time to time, to replenish equipment they carry in their vans.

There is no dispute that technicians are not always able to connect a receiver to an active telephone line. For example, some customers have opted to forego a land line for their telephone service, relying exclusively on cell phones for their telecommunications. In these situations, there are no live telephone lines in the home to connect. In other situations, customers will refuse to have telephone lines connected because they do not want the exposed lines and are unwilling to pay extra for a "wall fish" or wireless jack. There are also customers who will refuse to connect a telephone line to the receiver because they do not want to enable their children to order pay-per-view via the remote. Finally, there are some customers who simply do not want to give DirecTV access to the information that could be conveyed via their telephone lines. There is also undisputed evidence that some customers who allow the technician to connect the telephone line will unplug it after the technician leaves the home. In all of these situations, the receiver will be counted as a "non-responder".

In early 2006, Respondent MasTec was Respondent DirecTV's worst-performing HSP in terms of active responder rates on telephone lines. According to witnesses for the Respondents, Respondent DirecTV decided to penalize Respondent MasTec in an effort to get it to improve its responder rate. Beginning in the first quarter of 2006, Respondent DirecTV back-charged Respondent MasTec at the rate of $5.00 for each non-responder if its non-responder rate exceeded 47% in a month. In order to avoid this penalty, Respondent MasTec had to connect at least 53% of the receivers it installed to active telephone lines. It was in response to this move by Respondent DirecTV that Respondent MasTec implemented the policy that became the subject of controversy among its employees in Orlando.

On January 17, Respondent MasTec informed its technicians, by memo, that it was changing its pay structure in order to encourage employees to improve their performance in terms of telephone connections. Under the new pay structure, which was to be effective February 1, Respondent MasTec would reduce the amount paid on each installation by $2.00 and the amount paid on each additional outlet by $2.00 and would instead pay $3.35 for each responding, i.e. connected, receiver. The memo also informed employees that Respondent MasTec was establishing a minimum threshold of 50% responders per 30-day period. If a technician failed to meet this threshold, i.e. failed to connect active telephone lines to receivers in 50% of his installations, then his pay would be reduced by $5.00 per non-responding receiver bi-weekly. If a technician failed to meet the 50% threshold for a consecutive 60-day period, he would be subject to termination. The memo concluded by illustrating through several hypothetical employees how, under the new pay structure, a technician could earn more than he was currently making if he increased his responder rate.

There is no dispute that Respondent MasTec communicated this policy not only in the January 17 memo but by having its supervisors discuss it with the employees at weekly team meetings after the memo came out. Christopher Brown, the Operations Manager for North Florida, also spoke to employees at the team meetings about the new policy. Several technicians testified as witnesses for the General Counsel about these meetings. Their testimony establishes that the technicians resisted the change from the start, speaking up at each meeting about the difficulty in achieving the 50% threshold due to factors beyond the technician's control. Frequently cited by the employees was the problem with customers who did not have land line telephones and customers who adamantly refused a telephone connection. Some technicians complained that even after connecting the phone line, the customer could disconnect it. According to these witnesses, Respondent MasTec's supervisors brushed off the employees' concerns, advising the technicians to tell the customer whatever was necessary to make a connection, even if that meant lying to a customer. Several witnesses recalled supervisors instructing them to simply connect the phone line without telling the

customer, or to hardwire the telephone jack into the wall so the customer could not disconnect it after they left. At least one supervisor told the technicians to tell the customer the receiver wouldn't work without the phone line connected. Respondent's witnesses conceded that this latter statement was not true. Several witnesses testified that, at one meeting, Operations Manager Christopher Brown told the technicians to do whatever they could to convince the customer, to say anything, even that the box (receiver) would blow up if not connected to the phone line. Several of General Counsel's witnesses admitted they laughed at this statement and believed Brown was joking.

Christopher Brown admitted making the statement about the box blowing up if not connected to a phone line but claims he said this in order to add some "comic relief" during a tense meeting which appeared to be going nowhere. According to Brown, at every meeting the technicians brought up the same excuses why they could not make the 50% threshold and at each meeting he, Villa and the supervisors attempted to explain how they could. Brown and Villa both testified that they offered suggestions to the employees about ways to convince a customer of the benefits of a telephone connection but continued to hear the same complaints. Brown resorted to his "comic relief" only out of frustration with the lack of progress in convincing the employees of the need to improve their responder rates. While not disputing much of the testimony of General Counsel's witnesses, Brown and Villa insisted that they never told the technicians to "lie" to a customer, or to do "whatever it takes", to accomplish the goal of connecting phone lines.[6]

Although there is no evidence that Respondent DirecTV required Respondent MasTec to adopt the new pay structure, it participated in the effort to get the technicians to increase their responder rates by distributing a training video on the subject of phone lines. This video, which Respondent MasTec showed to its Orlando employees in February or March, after the change in pay structure was announced, featured Respondent DirecTV vice presidents Steven Crawford and Scott Brown. In the video, Crawford states that technicians should not blame their manager, supervisor or employer for the increased emphasis on phone lines because he was the one putting pressure on them to get it done. Crawford also offered suggestions to technicians on how to get the phone lines connected, including doing so without telling the customer, or by telling the customer such a connection was "mandatory". There is no dispute that, while a telephone connection is mandatory for HSPs and the technicians employed by them, it is not mandatory for the customer.

On March 17, Respondent MasTec informed the technicians, by memo, that the new pay structure, including the $5.00 per non-responder charge-back, was going into effect and that the first pay checks reflecting this would be issued on March 24. The Monday after employees received their first paychecks reflecting charge-backs, i.e. March 27, a large group of technicians gathered in the parking lot outside the Orlando facility before work to complain about the new pay structure. Senior Supervisor Villa came outside to talk to them. There is no dispute that the technicians were upset and angry and voiced many of the same concerns they had expressed in team meetings and individually in the weeks preceding implementation of the new pay structure. Villa testified that he was subjected to name-calling and profanity. Nevertheless he tried for about an hour to calm the group and get then to return to work. After about an hour, Chris Brown, who had been called by Villa and informed of the uprising, arrived at the facility and also spoke to the technicians in the parking lot. Both Brown and Villa tried to

[6] Delroy Harrison, one of General Counsel's witnesses, conceded on cross-examination that none of Respondent MasTec's supervisors ever specifically told the technicians to "lie" to a customer.

point out to the technicians that some of the them had actually earned more money under the new system, suggesting that if all of them worked at connecting more telephone lines they would not have to worry about losing money. One employee who testified, Delroy Harrison, had been back-charged $405.00 and demanded that Brown reimburse him. Harrison was with another technician, Hugh Fowler, who had made money and Brown pointed this out to Harrison.

After getting nowhere with the technicians, Brown went into the office and spoke to his boss, Gus Rey. He returned to the parking lot and told several of the technicians that he would look into their complaints. According to Brown, when he looked at the pay stubs of some of the complaining technicians, they "looked kind of weird". Brown promised to investigate and make sure that the new structure had been applied properly. He promised to have an answer the following day. Brown also promised the technicians that he would devise a way to track the technicians responder rate in the field to help them in meeting the threshold. All witnesses agree that, at some point, Brown climbed on top of a van and told the technicians it was time to get back to work. After this, the technicians began to disperse and leave for their morning appointments. Brown testified that it was about 11:00 am when this happened, three hours after technicians are supposed to be at their first appointment.[7]

Harrison testified that, before leaving, he spoke individually with Chris Brown. According to Harrison, he told Brown that what the company was doing was not right. Brown responded by telling Harrison that he had replacements for all of them. Harrison ended the conversation by telling Brown that things were going to change because what they, i.e. the company, was doing was not right. According to Harrison, no one else witnessed this conversation.[8] Brown's version of this conversation is more detailed. According to Brown, Harrison showed him his work orders for the day and said that if he went to a job with five receivers and he couldn't connect the phone lines, he would cancel the job. Brown testified that he expressed surprise that Harrison would throw away what he could earn on such a job simply because it would count against him on his responder rate. Later in the conversation, Brown said to Harrison

> You know what? If there's a part of my job I don't want to do, and I just refuse to do, there's someone else, there's a replacement ready to take my job, and will gladly do everything that needs to be done for my job. I can be replaced, you can be replaced [referring to the tech], we can all be replaced if we don't want to do our jobs.

There is no dispute that Harrison did his route that day and did not refuse to do any installations.

The technicians gathered in the parking lot again the next day, i.e. March 28. As promised, Brown met with the technicians and distributed the "tracking" sheet he had developed. He also provided answers to some of the individual complaints he had investigated. All of the witnesses who testified about this second day agreed that the exchange was much the same as the day before, i.e. the technicians still complaining, essentially, that they should not be held responsible for non-responders because of circumstances beyond their control and Brown telling them that this is the way it's going to be and to just do it. It was also agreed that this gathering did not last as long as the previous day. After a while, Brown told the employees it was time to get to work and they began to disperse. Harrison alone testified that Brown told the technicians that, if they did not want to work, they could leave and if they did not leave it would

[7] General Counsel's witnesses did not dispute the testimony that many of the technicians did not leave to begin their routes until 11:00 am.

[8] Harrison's testimony is the basis for the complaint allegation that Respondent MasTec threatened employees with discharge if they concertedly complained about their wages.

force him to do what he didn't want to do. Harrison recalled that Brown then turned to one of the supervisors, Mike Cuzon, and told him not to let this happen again, that if any technicians had a complaint, they should see him individually. Harrison spoke up, telling Brown that the employees wanted to speak as a group, not individually.[9] Guest, who also testified about the Tuesday gathering, did not corroborate this testimony. Fowler testified that Brown told the employees if they did not want to do their jobs he had replacements for them. According to Fowler, Brown went on to say that "this is a business, not a family." Brown denied saying, "don't make me do what I don't want to do." Rather, he claims he told the technicians that they needed to get to their jobs before they started missing appointments and worse things happened. There is no dispute that none of the technicians who gathered in the parking lot on Monday and Tuesday were disciplined for their participation in this group protest.

After the two parking lot protests, still unhappy with Respondent MasTec's new pay structure and believing that their concerns were not being addressed, several of the technicians began discussing ways to go public with their dispute. Guest testified that it was technician Frank Martinez who suggested they contact the media.[10] Guest was corroborated by Fowler and Harrison. According to Harrison, the employees hoped the media spotlight might put pressure on Respondent MasTec to abandon the new policy of charging back employees for non-responders. Although several media outlets were contacted, only one expressed an interest in their story, WKMG-TV Local 6 (referred to here as Channel 6). According to General Counsel's witnesses, it was Martinez who set up the appointment with Nancy Alvarez, a reporter from Channel 6, so employees could tell her about the new policy. There is no dispute that, on March 30, the 27 technicians named in the original complaint, along with Martinez, went to the TV station to meet with Alvarez. There is also no dispute that the technicians drove to the station in their DirecTV vans, wearing their DirecTV uniforms. Most of the technicians drove to the station from Respondent MasTec's offices before starting their assignments for the day.

The General Counsel's witnesses testified that no specific plan to wear their uniforms and drive together in their work vans had been discussed before the meeting at the TV station. According to these witnesses, the apparent caravan and similarity in appearance were merely coincidental. The employee witnesses also denied that they had agreed in advance to designate anyone as their spokesperson, or that they had planned what to say. However, once they got to the TV station, Martinez assumed the role of spokesperson and did most of the talking with Alvarez. After initially talking to Martinez and a few others, Alvarez invited all the technicians who were there into the station where she interviewed them as a group while filming the exchange. According to the General Counsel's witnesses, it was Alvarez who determined which technicians to interview and what statements to highlight in her report. The employees left the TV station at approximately 9:45 am, at which point they resumed their work assignments.

Christopher Brown testified that he was informed that technicians were in the parking lot of Channel 6. He admitted that he and Villa drove by the TV station and confirmed this. When they arrived, the technicians were leaving in their vans. There is no evidence, nor allegation, that either Brown, or any other Respondent MasTec supervisor, questioned any of the technicians about their visit to the TV station or took any action against them before the broadcast of the report made from these interviews. Both Respondents were contacted by Alvarez after she met with the technicians and asked for a response to accusations made by the

[9] This testimony by Harrison is also relied upon by the General Counsel as the basis for the allegation that Respondent MasTec threatened employees with discharge.

[10] Martinez, who resigned and was not named as a discriminatee, did not testify at the hearing.

technicians, including a claim that they had been told to lie to customers. Rather than agreeing to be interviewed, each Respondent submitted a written statement to the TV station. Respondent DirecTV's Director of Public Relations Robert Mercer, sent the following statement to Alvarez on April 21 via e-mail:

> We fully endorse MasTec's plan to provide incentives for technicians to install the required phone line connections so our customers can enjoy the full complement of DIRECTV services. We believe it's fair and offers technicians, who properly perform their installation work, an opportunity to make more money. DIRECTV pays for the installation of a phone line and we advertise it as part of our service. Technicians who don't make that connection are denying our customers the full benefit and function of their DIRECTV System, and as a result, we're not fulfilling our promise to the customer, and that's an issue we take quite seriously.

Respondent MasTec's written statement, while also emphasizing the benefit of a telephone connection to the customer, also explained in detail how the charge-back policy worked and how a technician could benefit from it.

Channel 6 first aired its broadcast of the technicians' complaints on May 1, during the 5:00 pm newscast.[11] The broadcast was preceded by an advertisement, called a "teaser", about the upcoming news report, which appeared on Friday, April 28. The teaser opened with a reporter asking, "Why did over 30 employees of a major company show up at Local 6?", followed by video of the following exchange between the reporter and one of the technicians:

> Interviewer: So you've basically been told to lie to customers?
> Technician: Yeah.

A voice over then intones, in response to the first question, "to tell the Problem Solvers about a dirty little secret." This is followed by video of the technician saying, "Tell the customer whatever you have to tell them." The teaser continues with the reporter saying, "That may be costing you money."

The full news story which aired on May 1, is as follows:

> News Anchor 1: Only on 6 … a problem solver investigation with a bit of a twist … this time they came to us.
>
> New Anchor 2: Yeah … technicians who have installed hundreds of DirecTV satellite systems across Central Florida ... they're talking about a company policy that charges you for something you may not ever use. And as problem solver Nancy Alvarez found, if you don't pay for it, the workers do.
>
> Reporter Alvarez: They arrived at our Local 6 studios in droves. DirecTV trucks packed the parking lot and inside the technicians spoke their minds. (accompanying video showed more than 16 DirecTV vans in the parking lot followed by a shot panning a group of technicians wearing shirts bearing the DirecTV logo).

[11] Video of all of the broadcasts and teaser ads are in evidence along with transcripts prepared by the parties.

Technician Lee Selby[12]: We're just asking to be treated fairly.

Alvarez: These men have installed hundreds of DirecTV systems in homes across Central Florida but now they admit they've lied to customers along the way.

Hugh Fowler[13]: If we don't lie to the customers, we get back charged for it. And you can't make money.

Alvarez: We'll explain the lies later but first the truth. Phone lines are not necessary for a DirecTV system; having them only enhances the service allowing customers to order movies through a remote control instead of through the phone or over the internet.

Alvarez: So it's a convenience …

Technician Martinez[14]: It's more of a convenience than anything else…

Alvarez: But every phone line connected to a receiver means more money for DirecTV and MasTec, the contractor these men work for. So the techs say their supervisors have been putting pressure on them. Deducting five bucks from their paychecks for every DirecTV receiver that's not connected to a phone line.

Martinez: We go to a home that…that needs three…three receivers that's … fifteen dollars.

Alvarez: Throw in dozens of homes every week and the losses are adding up fast.

Alvarez (questioning a room full of technicians): How many of you here by a show of hands have had $200.00 taken out of you paycheck? (accompanying video showed virtually every technician in the room raising his hand).

Martinez: More.

Alvarez (reporting): Want to avoid a deduction on your paycheck? Well, according to this group, supervisors have ordered them to do or say whatever it takes.

Martinez: Tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up.

Alvarez (interviewing): You've been told to tell customers that…

Martinez: We've been told to say that. Whatever it takes to get the phone line into that receiver.

Alvarez (reporting): That lie could cost customers big money…the fee to have a phone line installed could be as high as $52.00 per room…want a wireless phone

[12] Selby is not an alleged discriminatee in this case, having resigned before the terminations at issue.

[13] Fowler is one of the alleged discriminatees who testified at the hearing.

[14] As previously noted, Martinez resigned before the broadcast.

jack? That will cost you another 50 bucks.

Alvarez (shown outside Respondent's Orlando office attempting to speak to Villa): We're hoping to talk to you guys about some concerns raised by your employees…

Villa: Sorry … guys, I need you to walk out of the office; this is a private office.

Alvarez (reporting): The bosses at MasTec's Orlando office did not want to comment.

Alvarez (seen attempting to interview Villa): We have employees saying that you asked them to lie…

Villa: Please .. thank you …

Alvarez: … to customers. Is that true? (this exchange while video shows Alvarez and camera crew being ushered out of the office).

Alvarez (again in reporting mode): But statements from their corporate office and from DirecTV make it clear the policy of deducting money from employees' paychecks will continue. A DirecTV spokesman said techs who don't hook up phone lines are quote 'denying customers the full benefit and function of their DirecTV system.' These men disagree and say the policy has done nothing but create an environment where lying to customers is part of the job.

Alvarez (interviewing): It's either lie or lose money.

Technician Sebastian Eriste[15]: We don't have a choice.

Alvarez (reporting): Now …. During our investigation, MasTec decided to reimburse money to some techs who had met a certain quota but the policy continues and one reason could be that DirecTV does keep track of their customers' viewing habits through those phone lines. Now just last year, DirecTV paid out a $5 million settlement with Florida and 21 other states for deceptive practices and now, because of our story, the attorney general's office is looking into this newest issue so we'll, of course, keep you posted.

News Anchor 2: You think they would have learned the first time.

Alvarez: You think so. We'll see what happens.

News Anchor 2: Thank you, Nancy.

This report aired several more times over a two-day period, in slightly different versions but with the same theme. Employees Guest and Fowler testified that they did not see the broadcast before it was aired, that Alvarez did not review with them the content of the report and that the only input they had was their appearance at the station and the responses to Alvarez' questions.

Christopher Brown, Respondent MasTec's Operations Manager, testified he first

[15] Eriste is one of the alleged discriminatees.

became aware of the broadcast when he saw a "teaser ad" for the upcoming newscast. He called his boss, Rey, and Respondent MasTec's Vice President Retherford to alert them about the news story. According to Brown, he was instructed to record the teaser and any broadcast about Respondents. Brown did so and converted the recordings to computer files which he e-mailed to his superiors. Retherford testified that he saw the initial broadcast, as well as subsequent reports aired on May 2 and 3. Retherford provided Respondent DirecTV's Vice President Crawford and Public Relations Director Mercer web links to the broadcast. Retherford admitted being "shocked" by the report, especially by what he characterized as the "flippant" attitude of the technicians about lying to customers. Retherford and Crawford admitted that they discussed the broadcast and their concerns about the negative light it casts on DirecTV. It is undisputed that Crawford told Retherford that he did not want any of the technicians who appeared in the broadcast representing DirecTV in customers homes. A series of e-mails between Crawford and Retherford on May 1 and 2 establishes that Respondent DirecTV was concerned about these technicians continuing to work on DirecTV installations after they were shown on TV saying they had been lying to customers and refusing to do phone lines. It is apparent that Respondent DirecTV was eager to have Respondent MasTec take action against the technicians involved in the broadcast.[16]

Following his conversations with Crawford, Retherford directed Christopher Brown to determine which technicians appeared in the broadcast. Brown and Villa reviewed the broadcast several times to identify all of the technicians. Brown then sent Retherford a list of the technicians. Retherford testified that, on the afternoon of May 2, he made the decision to terminate all the technicians who were shown in the broadcast after receiving the information from Brown and discussing it with Brown and Rey. It is undisputed that this decision was made without any further investigation and without interviewing the employees involved. It is clear that Retherford, in reaching this decision, did not seek to differentiate the technicians based on whether they were quoted on the broadcast. Nor did he consider each technicians individual degree of participation in the report. Retherford testified that he made this decision because he believed the technicians who had appeared on television had impaired Respondent MasTec's relationship with respondent DirecTV. He testified that the technicians had misrepresented the product by stating that telephone lines were only a convenience and by saying they had been told to lie to customers. Retherford testified further that statements indicating that every technician had been back-charged for failing to connect phone lines was a misrepresentation. Other misrepresentations identified by Retherford were statements that technicians were being charged $5.00 for every receiver not connected and that Respondent MasTec made money on telephone connections. Respondents offered evidence at the hearing that, after the news story aired, they each received telephone calls from customers asking to cancel their DirecTV service.

After making his decision, Retherford called Christopher Brown and told him that all of the technicians who appeared in the broadcast were to be discharged. Retherford instructed Brown to have Villa tell the technicians they were being discharged "at will". Villa was not to give any other reason for the discharge. On Wednesday morning, May 3, Villa instructed the supervisors to call the technicians who were to be terminated and tell them to come into the office after they finished their routes. As each technician came in, Villa told him he was being terminated "at will" and asked him to return the keys to his vehicle, gas card and cell phone. If an employee asked why he was being terminated, Villa would only repeat that they were being terminated "at will." Even when some technicians asked if they were being terminated because

[16] For example, in one e-mail, Crawford asks Retherford, "of the 30 or so techs on the show are they still employed?"

of the broadcast, Villa responded only that they were terminated "at will." The only technicians not terminated on May 3 were those who were on vacation. Those technicians who were on vacation, with one exception, were terminated before they returned. Tuckfield who was also on vacation was not terminated. Instead, according to Brown, he was retained because of concerns about getting the work done with so much of the workforce terminated. Brown and Rey made the decision not to terminate Tuckfield without consulting with Retherford.[17]

Ricardo Perlaza, one of the technicians who appeared in the Channel 6 broadcast, testified that he received a telephone call from his supervisor, Noel Muniz, on May 2, before anyone was terminated. Perlaza testified that Muniz asked him if he had anything to do with the news story. When Perlaza said he had, Muniz asked him why. Perlaza explained that he did not agree with what was going on and did not like the charge-back policy. According to Perlaza, Muniz responded by telling Perlaza that he "was not supposed to do that." Muniz then asked Perlaza if he knew what had happened in New Jersey. When Perlaza said he did not, Muniz told him the employees there tried the same thing and Respondent MasTec closed the facility. At the end of the conversation, Muniz told Perlaza he should call Chris Brown and apologize and tell Brown he did not know the consequences of going to the TV station. Muniz said if Perlaza did not do this, there would be a lot of trouble for everybody. Muniz, while not specifically denying that he had a conversation with Perlaza on May 2, denied ever speaking to Perlaza about a MasTec facility in New Jersey. In fact, Muniz denied having any knowledge of such a facility at the time he spoke to Perlaza, and specifically denied telling Perlaza that the facility in New Jersey had closed because employees there complained about working conditions.[18]

2. *Alleged Section 8(a)(1) Threats*

The complaint alleges, at paragraph 8, that Respondent MasTec, through Christopher Brown, violated Section 8(a)(1) of the Act in late March by threatening to discharge employees if they concertedly complained about their wages. As noted above, the General Counsel relies upon the testimony of Harrison and Fowler regarding two statements allegedly made by Brown during the two group protests in the parking lot on March 27 and 28. The first involves Harrison's testimony that Brown told him that he had replacements for all of them. This statement was made after Harrison told Brown that what Respondent MasTec was doing to the technicians wasn't right. Although Brown admitted telling Harrison that he could be replaced, he placed this comment in the context of a conversation with Harrison over Harrison's refusing to do any installation where he could not connect the phone lines. As described by Brown, this attempt at self-help by Harrison amounted to a refusal to perform assigned work. Thus, in his version of the conversation, he was simply telling Harrison that if he refused to do the work, someone else could be hired to replace him who would do whatever was asked.

Because there are no other witnesses to this conversation, I must first determine which

[17] Fowler was on a three-week assignment working in the Atlanta area when he was called and told to return to Orlando. Although his supervisor would not give him a reason, Fowler learned from other technicians while driving back from Atlanta that they had been terminated. By the time he got to Gainesville, his company cell-phone had been turned off. Fowler did not report to the office when he returned to Orlando and learned that all the other technicians had been fired. Respondent MasTec eventually picked up the truck from his home.

[18] In a pre-trial affidavit Muniz gave to the Board's Regional Office, he admitted having a conversation with another former employee who told him that the New Jersey facility had closed. Muniz explained at the hearing that this conversation occurred after he spoke to Perlaza.

of these two witnesses is more credible. As between Harrison and Brown, I find that Brown's more detailed recollection of the conversation is more credible than the isolated comment in Harrison's version. I reaching this conclusion, I note that Harrison's testimony in general was marked by inconsistencies both internally and as between his testimony and his pre-trial affidavit. His demeanor also conveyed hostility toward Respondents which may have colored his recollection of the events. In addition, the alleged threat to replace all the technicians makes no sense out of context. I note that this threat was allegedly made after Brown and Villa had spent several hours listening to the employees' complaints and attempting to answer their questions, and after Brown had asked the employees several times to return to work. Rather than a threat to discharge the employees for exercising their right to engage in concerted activity, I find that Brown was simply telling Harrison that, if he did not want to do his job, there were others who would be willing to do it and he, Harrison, could be replaced. This statement was made only after Harrison told Brown that he would not do an installation if he went to a job where he could not connect the phone lines.[19]

The General Counsel also cites Fowler's testimony that Brown told the employees in the parking lot on the second day that if they did not want to do their jobs, he had replacements for them. Although Fowler testified that Brown made this statement to a group of employees, no one corroborated his testimony. In the absence of corroboration, I can not credit this testimony. Even assuming Brown made this statement, I would not find that it was a threat to discharge employees for engaging in protected activity. At most, it was a statement that employees who refused to do their jobs could be replaced.

Based on my credibility resolutions, I find that General Counsel has not met his burden of proving that Respondent violated Section 8(a)(1) through any statements made by Brown on March 27 and 28. Accordingly, I shall recommend dismissal of paragraph 8 of the complaint.

The complaint alleges at paragraph 9(b) that Respondent violated Section 8(a)(1) of the Act, during Muniz' telephone conversation with Perlaza on May 2, by threatening employees with facility closure and unspecified reprisals because they concertedly complained about their wages and appealed to third parties.[20] This allegation also turns on credibility. As to this allegation, Perlaza gave the more detailed account of the conversation. Muniz simply denied, in response to leading questions, that he had a conversation with Perlaza about the New Jersey facility and that he made the alleged threat. Yet, on cross-examination, he conceded that he was aware of Respondent MasTec closing a facility in New Jersey. His explanation for this discrepancy, that he did not learn about the New Jersey facility until after speaking to Perlaza, is dubious. I thus credit Perlaza's testimony. Based on that testimony, I find that Muniz told Perlaza that Respondent MasTec had closed a facility in New Jersey when employees "tried the same thing", referring to the Orlando employees participation in the news story. The implication in this statement is that Respondent MasTec would do the dame thing in Orlando. That is why Muniz suggested to Perlaza that he apologize to Brown because, if he didn't, "there would be a lot of trouble for everybody." Because these statements, under all the circumstances, would reasonably tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights, I find that Respondent violated Section 8(a)(1) of the Act, as alleged in paragraph 9(b) of the complaint. *Grouse Mountain Lodge,* 333 NLRB 1322, 1324-1325 (2001), quoting from

[19] I also do not credit Harrison's uncorroborated testimony that Brown told the employees the following day, when they refused to leave the parking lot to start their assignments, "don't make me do what I don't want to do." Even assuming Brown made this statement, it was in response to the employees' refusal to work, not their protected concerted activity.

[20] General Counsel withdrew complaint paragraph 9(a).

American Freightways Co., 124 NLRB 146 (1959).

3. *Alleged Termination of Employees for Engaging in Protected Concerted Activities*

The complaint alleges that the technicians employed by Respondent MasTec were engaged in concerted activities protected by Section 7 of the Act during the period from January through March when they protested their employer's new pay structure, which included the charge-back provision for non-responding receivers. This protected activity is alleged to include objections to the new policy voiced by technicians at team meetings as well as the group protests in the parking lot on March 27 and 28 when they confronted Villa and Chris Brown after the first paychecks with charge-backs had been issued. The complaint alleges that the employees' protected concerted activity continued on March 30 when a number of them went to the studios of Channel 6 to air their dispute publicly and enlist the support of the local news program. The General Counsel further alleges that Respondent DirecTV caused Respondent MasTec to discharge 26 of the employees and that MasTec in fact discharged them in early May because they engaged in this protected concerted activity.

Respondents do not dispute the concerted nature of the employees activity. It also appears that, with the exception of the visit to the TV station, the Respondents also do not challenge the protected nature of this concerted activity. Although Respondent MasTec, in a footnote in its brief, appears to suggest that those employees who used profanity during the parking lot protests or refused to go to work when requested to do so by Chris Brown during that protest, may have exceeded the bounds of protected conduct, it does not argue for dismissal of the complaint on that basis. In any event, there is no evidence here that Respondent MasTec discharged any of the employees who participated in the parking lot protest for using profanity or being insubordinate. In fact, both Respondents argue that Respondent MasTec's choice not to discipline any of the employees after these incidents establishes that it was not motivated by any "protected" concerted activity in terminating the twenty-six employees whose status is in dispute. It is clear from the evidence in the record that the sole reason Respondent MasTec terminated the employees was their appearance in the Channel 6 news report that aired on May 1 and that, had the employees not gone to the media with their complaints, they would not have been terminated for the other conduct they engaged in before March 30.

With respect to the allegation that Respondent DirecTV caused Respondent MasTec to terminate the 26 employees, I agree with the General Counsel that the evidence in the record clearly supports this allegation. Although Respondent DirecTV may not have any contractual right to determine whether Respondent MasTec should hire or fire an employee, here the conversations between Retherford and Crawford, as well as the e-mails exchanged within a day of the first broadcast on May 1, show that Respondent DirecTV expected Respondent MasTec to terminate these employees. Crawford clearly informed Retherford that he did not want any of the employees who appeared in the broadcast to represent DirecTV. Because Respondent MasTec only performed work for Respondent DirecTV, it had no choice but to terminate the employees in response to this statement. Accordingly, I find as alleged in the complaint that Respondent DirecTV attempted to cause and did cause Respondent MasTec to terminate the 26 employees named in the complaint. *Dews Construction Corp.,* 231 NLRB 182 (1977), enfd. 578 F.2d 1374 (3rd Cir. 1978).

The only issue remaining is whether, in terminating these employees, Respondents violated Section 8(a)(1) of the Act. Resolution of this issue turns on whether the employees who appeared in the news story broadcast by Channel 6 on May 1 were entitled to the protection of Section 7 of the Act. In the *Jefferson Standard* case, the Supreme Court held that employees

engaged in concerted activity lose the Act's protection when they engage in disloyalty to their employer by making disparaging attacks on the quality of the employer's products and services that are unconnected to a labor dispute. [21] Since *Jefferson Standard* was decided, the Board and the courts have recognized that employees have a right to seek support from outside parties, including the media, as long as their communication with such parties relates to an ongoing labor dispute and is not disloyal, reckless, or maliciously false. *Five Star Transportation, Inc.,* 349 NLRB No. 8, slip op. at pp 4-5 (January 22, 2007), and cases cited therein. See also, *Endicott Interconnect Technologies, Inc.,* 345 NLRB 448 (2005), enf. denied 453 F.3d 532 (D.C. Cir. 2006); *St. Luke's Episcopal-Presbyterian Hospitals, Inc.,* 331 NLRB 761 (2000), enf. denied 268 F.3d 575 (8th Cir. 2001); *Allied Aviation Service,* 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3rd Cir. 1980). In *Five Star Transportation,* supra, the Board recently described its approach to these cases as follows:

> In determining whether employee conduct falls outside the realm of conduct protected by Section 7, we consider whether 'the attitude of the employees is flagrantly disloyal, wholly incommensurate with any grievances which they might have, and manifested by public disparagement of the employer's product or undermining its reputation …' [citation omitted]. A critical further determination is whether the conduct bears a 'sufficient relation to [employee] wages, hours, and conditions of employment' [citations omitted].

Finally, in *Jefferson Standard,* supra, the Court warned that it is often necessary in these types of cases to identify and recognize those employees engaged in such disloyal conduct separate and apart from other employees who, while engaged in simultaneous protected activity, refrained from joining others who engaged in acts of insubordination, disobedience, or disloyalty. 346 U.S. supra, at 474-475.

Applying the law to the facts here, I find initially that the technicians' appeal to the public, through the Channel 6 news story, did relate to an ongoing labor dispute with their employer. The contact with reporter Nancy Alvarez and the visit to the TV station was the culmination of the employees' efforts to get Respondent MasTec to rescind the charge-back policy which had just gone into effect. As broadcast on TV, the first employee to appear in the report expressed what the employees were looking for when he said, "We're just asking to be treated fairly." The reporter, in her story, referred to the $5.00 charge for non-responders that Respondent MasTec was deducting from the employee's wages and its impact on the employees. At other points in the story she and the employees addressed this particular policy. Any reasonable viewer would understand, watching the story, that the technicians who appeared were concerned about their wages. While the anchors and reporters highlighted the consumer protection aspect of the story, the underlying labor dispute was evident throughout the report. See *Endicott Interconnect Technologies,* supra.[22]

The more difficult issue here is whether the remarks broadcast were so disloyal, disparaging and malicious as to be unprotected, and whether all 26 employees who appeared in the broadcast can be held accountable for these remarks. It is true, as General Counsel argues, that only four employees spoke in the video and that most of the statements which Respondents characterize as false and disparaging were made by Alvarez, the reporter. Three of the four

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[21] *NLRB v. Electrical Workers (IBEW) Local 1229,* 346 U.S. 464 (1953).

[22] Although the Court of Appeals denied enforcement to the Board's order in *Endicott*, it did so based on its disagreement with the Board regarding the disparaging nature of the statements in the media, not because they were unrelated to a labor dispute. 453 F.3d, supra at 537, fn. 5.

employees quoted, i.e. Fowler, Martinez and Eriste, made statements indicating that they were instructed to, or encouraged, to lie to customers.[23] Clearly, such statements are highly inflammatory and damaging to Respondents' reputation. Moreover, it is these statements which apparently enticed the TV station to even do a story about Respondents' business. The teaser ad which preceded the news report included an excerpt in which a technician claims he'd been told to lie to customers and the reporter telling the audience "that may be costing you money." The story itself highlighted the technicians claims suggesting they were forced to lie to customers and linked those "lies" to higher costs to the customer. This aspect of the story was clearly inaccurate and misleading. While it is true that it was important to both Respondents that they connect phone lines, such connections cost the average customer nothing. Only in those cases where a customer opted to hide the phone line was there a charge. This was never pointed out in the story.

The evidence also does not support the claims expressed in the story that employees had to lie to customers to avoid being subjected to the $5.00 charge-back. While it is true that employees were subject to this penalty, it would only be applied if they failed to connect at least 50% of the receivers they installed.[24] Similarly, although Respondent's supervisors made statements at employee meetings that employees needed to connect the phone lines and had to do whatever was necessary to convince a customer of the benefits of doing so, they were never explicitly told to lie and, certainly, they were provided with other ways of accomplishing this part of their jobs without resort to lying. Yet the comments by the technicians that were broadcast and the statements by Alvarez in the news story made it appear that the employees only recourse was to lie to the customers, "or we can't make money", as Fowler claimed. Even Martinez statement that technicians were told to tell customers that the receiver would blow up if not connected to a phone line, while accurate, was deliberately misleading. I credit Christopher Brown's testimony that he made this statement at a meeting as a joke and did not intend or expect any technician to say that to a customer. The testimony of most of General Counsel's witnesses also makes clear that the employees who heard Brown say this understood he was not being serious. Yet Martinez chose to publicize this comment for no apparent reason other than to harm the reputation of his employer. I also note that Guest admitted that he raised his hand when Alvarez asked which employees had more than $200 in charge-backs even though he had not had any. Although Guest testified that he raised his hand because he had more than $200 deducted for other reasons, he clearly was aware when Alvarez asked the question that she was talking about the non-responder charge-backs. Guest's willingness to mislead the public in this manner in support of the employees' position in the labor dispute is troubling.

Based on the above, I find that the statements broadcast in the Channel 6 news story were so "disloyal, reckless, and maliciously untrue" as to lose the Act's protection. A review of the broadcast convinces me that the employees' attitude during the broadcast was "flagrantly disloyal, wholly incommensurate with any grievances they had, and manifested by public disparagement of [the Respondents'] product and undermining of their reputation." *Five Star Transportation,* 349 NLRB supra, at p. 4, quoting from *Veeder-Root Co.,* 237 NLRB 1175, 1177 (1978). The focus of the news report and the employees' comments on apparently fraudulent and deceptive business practices overshadowed the labor dispute that led the employees to seek media support in the first place and were necessarily injurious to Respondents' business.

[23] The fourth employee, Selby, is the one who said the technicians just wanted to be treated fairly. Standing alone, this statement is clearly protected.

[24] While it is not necessary for me to determine the reasonableness of the company policy and the employees' reaction to it, it certainly appears from the evidence in the record that the 50% threshold was not impossible to meet, despite the employees excuses.

Although only two of employees named in the complaint made disparaging comments in the broadcast (Fowler and Eriste), I find that the others who participated and were shown in the broadcast, are equally culpable. Their appearance lent tacit support to the disloyal, disparaging and malicious statements made by the technicians who spoke. A reasonable person viewing the broadcast would perceive the employees as being in agreement since no one spoke up to clarify the damaging statements. The employees' mere presence is no different from the conduct of the employees in *Jefferson Standard* who distributed the disloyal handbill that was prepared by someone else, or the employees who did not sign a disparaging letter but authorized another employee to send it. *TNT Logistics North America, Inc.,* 347 NLRB No. 55 (July 24, 2006).

Accordingly, based on the above, and the record as a whole, I find that the employees who participated in the Channel 6 news story that was broadcast on May 1 were engaged in activity that was not protected by Section 7 of the Act. Therefore, Respondent DirecTV's attempt to cause their discharge by Respondent MasTec, and Respondent MasTec's discharge of them did not violate the Act.

Conclusions of Law

1. By maintaining a confidentiality policy that interferes with, restrains and coerces employees in the discussion of their wages, hours, and terms and conditions of employment, and by maintaining an overly broad solicitation and distribution rule that also required employees to obtain permission to engage in protected concerted activity, Respondent MasTec has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By threatening employees with facility closure and other unspecified reprisals for engaging in protected concerted activity, Respondent MasTec has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. Respondent MasTec did not engage in any other unfair labor practices alleged in the complaint.

4. Respondent DirecTV has not violated the Act in any manner as alleged in the complaint.

Remedy

Having found that Respondent MasTec has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To the extent it has not already done so, Respondent MasTec shall rescind the confidentiality, solicitation and distribution rules that appeared in the employee handbook in March 2006. Respondent MasTec shall also be ordered to notify all employees who were issued the handbook containing the unlawful rules that the rules have been rescinded and will no longer be enforced. Such notification is to extend to employees at all MasTec facilities who were covered by the unlawful rules. Respondent MasTec shall also be required to post a Notice to Employees at the Orlando facility involved in this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, MasTec Advanced Technologies, a division of MasTec, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rules, including confidentiality rules, that restrict employees ability to discuss their wages, hours, and terms and conditions of employment with anyone.

(b) Maintaining any overly broad solicitation and distribution rules or other rules that require employees to obtain permission before engaging in protected concerted activities.

(c) Threatening employees with facility closure and other unspecified reprisals because they engaged in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the confidentiality policy and the solicitation and distribution rules as they existed in March 2006.

(b) Notify all employees who received the employee handbook that existed in March 2006 that these rules have been rescinded and will no longer be enforced.

(c) Within 14 days after service by the Region, post at its facility in Orlando, Florida, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2006.

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[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., January 4, 2008.

_____
Michael A. Marcionese
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain any rules, including confidentiality rules, that restrict your ability to discuss your wages, hours, and terms and conditions of employment with anyone.

WE WILL NOT maintain any overly broad solicitation and distribution rules or other rules that require you to obtain permission before engaging in protected concerted activities.

WE WILL NOT threaten to close the facility or engage in other unspecified reprisals because you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, to the extent we haven't already, rescind and no longer enforce the confidentiality, solicitation and distribution rules that existed in March 2006, which have been found to interfere with, restrain and coerce you in the exercise of your statutory rights.

WE WILL notify all our employees who were subject to these rules that they are no longer in effect and will not be enforced.

MASTEC ADVANCED TECHNOLOGIES,
A DIVISION OF MASTEC, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530

Tampa, Florida 33602-5824

Hours: 8 a.m. to 4:30 p.m.

813-228-2641.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 813-228-2662.